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IN THE

Supreme Court of the United States

October Term, 1950.

No. 109

RAYMOND M. CRANE, doing business as Associated Fruit Distributors,

Petitioner,

vs.

JOSEPH DENUNZIO FRUIT COMPANY, a corporation, and JOHN C. KAZANJIAN, doing business as Red Lion Packing Company,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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vs.

JOSEPH DENUNZIO FRUIT COMPANY, a corporation, and JOHN C. KAZANJIAN, doing business as Red Lion Packing Company,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Raymond M. Crane, doing business as Associated Fruit Distributors, respectfully prays that a writ of certiorari issue from this court, in the above entitled action, to review a final decision of the United States Court of Appeals for the Ninth Circuit rendered on April 16, 1951, a petition for rehearing having been denied on May 10, 1951.

Summary and Statement of Matter Involved.

This matter originated in a proceeding filed by Joseph Denunzio Fruit Company, a corporation, against Raymond M. Crane, doing business as Associated Fruit Distributors and John C. Kazanjian, doing business as Red Lion Packing Company, before the Secretary of Agriculture, under the Perishable Agricultural Commodities Act of 1930, as amended.

In its amended complaint Joseph Denunzio Fruit Company (hereinafter referred to as Denunzio) alleged that Raymond M. Crane, doing business as Associated Fruit Distributors (hereinafter referred to as Crane), either as principal or as agent for John C. Kazanjian, doing business as Red Lion Packing Company (hereinafter referred to as Kazanjian), or as both, contracted to sell to Denunzio three carloads of grapes at a price of $2.50 a box, that the grapes were never delivered and complainant was damaged in the sum of $5723.50. [R. pp. 17-28.]

Crane, by answer, denied acting as either principal or agent for Kazanjian and alleged that he was acting solely as a buying broker for Denunzio; denied that a valid contract was entered into; alleged that negotiations were had leading up to the sale of said grapes but certain stipulations were never complied with, that a confirmation of sale had never been signed or a deposit of $750.00 per car made; that as a buying broker for Denunzio, Crane was to receive $50.00 a car as a procurement charge; that he had no financial interest in the transaction other than the procurement charge. [R. pp. 49-52.]

Kazanjian, by answer, denied entering into the contract. [R. pp. 53-62.]

After the trial before the Department, an order was made by the Secretary of Agriculture ordering Crane to pay to Denunzio the sum of $5723.50, together with interest from December 10, 1944, at 5% per annum until paid. [R. p. 79.]

Crane thereupon appealed to the United States District Court for the Southern District of California, Central Division, and a trial *de novo* was had before the Honorable J. F. T. O'Connor, Judge of said court.

During the trial of the action before Judge O'Connor, he signified that he would hold Crane to be the agent of Kazanjian and not the procuring broker or agent of Denunzio, and counsel for Crane thereupon contended that if Crane was acting as agent for Kazanjian, then the payment by Denunzio of $2.50 a box for the grapes, plus $50.00 per car commission to Crane (Kazanjian's agent) constituted payment by Denunzio for said grapes of a price in excess of the O. P. A. ceiling and the contract was null and void and unenforceable. [R. p. 120.]

Judge O'Connor held the contract to be valid and enforceable and affirmed the order of the Secretary of Agriculture and awarded Denunzio an attorneys' fee in the sum of $3000.00 for the services of its attorneys in defending Crane's appeal. [R. pp. 139-152.]

Crane filed a motion for a new trial but before the same could be heard Judge O'Connor died.

Thereafter said motion was presented to Judge James M. Carter and Judge Carter held that the ceiling price of

said grapes was $2.50 a lug; that the contract sued upon was for the sale of merchandise at a price in excess of the O. P. A. ceiling and void and unenforceable; that a new trial was not necessary, and the court thereupon ordered that said action be dismissed. [R. pp. 164-184.]

Denunzio appealed from the ruling of said Judge Carter and the United States Court of Appeals for the Ninth Circuit on April 16, 1951, rendered a decision vacating the conclusions of law entered by Judge Carter and setting aside and reversing the judgment rendered by him "with directions to reinstate the findings of fact, conclusions of law and judgment of Judge O'Connor." A petition for rehearing was denied May 10, 1951. [R. pp. 268-274.]

Statement Disclosing Basis of Jurisdiction of Supreme Court.

This proceeding was filed before the Secretary of Agriculture of the United States Department of Agriculture under a Federal law, viz: the Perishable Agricultural Commodities Act of 1930, as amended, and under the provisions of said Act the United States District Court had jurisdiction to review the decision of the Secretary of Agriculture on a trial *de novo.*

The United States Court of Appeals had jurisdiction to review the decision of the United States District Court.

The Supreme Court has jurisdiction to review any judgment of the United States Court of Appeals.

The Questions Presented.

1. Is a contract for the sale of merchandise at a price in excess of the ceiling established by the Price Administrator under the provisions of the Emergency Price Control Act, valid and enforceable?

2. Can a contract for the sale of merchandise at a price in excess of the ceiling established by the Price Administrator under the provisions of the Emergency Price Control Act, be the basis of an action for damages by the buyer against the seller, where the seller refuses to carry out said contract?

Reasons Relied Upon for the Allowance of a Writ.

This court should issue the writ herein prayed for, for the following reasons:

1. The Court of Appeals by ordering the reinstatement of the findings of fact, conclusions of law and judgment of Judge O'Connor, in effect held that a contract for the sale of merchandise at a price in excess of the ceiling established by the Price Administrator under the provisions of the Emergency Price Control Act is (1) valid and enforceable, and (2) can be the basis of an action for damages by the buyer, where the seller refuses to carry out the contract. This holding is erroneous and without support in Federal and State court decisions.

2. The question presented herein as to the right to sue for damages for breach of an unlawful contract is

an important question of Federal law which has not been, but should be, settled by this court.

3. In sustaining the ruling of Judge O'Connor as to the validity and enforceability of the contract in question the Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this court.

4. The ruling of the Court of Appeals sustaining the judgment of Judge O'Connor is contrary to decisions of various State courts of last resort.

5. To clarify an uncertainty arising out of the opinion of this court in the case of *Bruce's Juices v. American Can Co.*, 330 U. S. 743, 91 L. Ed. 1219.

Wherefore, your petitioner respectfully prays that a writ of certiotrari be issued out of, and under the seal of, this Honorable Court directed to the United States Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in case numbered and entitled on its docket as "JOSEPH DENUNZIO FRUIT COMPANY, a Corporation, Appellant and Cross-Appellee, vs. RAYMOND M. CRANE, doing business as Associated Fruit Distributors, Appellee, and Cross-Appellant, JOHN C. KAZANJIAN, doing business as Red Lion Packing Company, a Corporation, Appellee, No. 12,662," and that said judgment of the Court of Ap-

peals may be reversed by this Honorable Court and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper, and your petitioner will ever pray.

BENJAMIN W. SHIPMAN,
Counsel for Petitioner.

HENRY O. WACKERBARTH,
Of Counsel.

Certificate of Counsel.

Benjamin W. Shipman, counsel for petitioner in the above entitled proceeding, does hereby certify that the foregoing petition is well-founded and not interposed for delay.

BENJAMIN W. SHIPMAN.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of Courts Below and of Secretary of Agriculture.

The order of the Secretary of Agriculture is dated February 26, 1947, and his decision is reported in 6 Agricultural Decisions 139. [R. pp. 63-79.]

The judgment of Judge O'Connor was docketed July 21, 1948, and his opinion is reported in 79 Fed. Supp. 117. [R. pp. 82-137, 139-152.]

The judgment of Judge Carter was entered May 19, 1950, and his opinion is reported in 89 Fed. Supp. 962. [R. pp. 164-184.]

The decision of the United States Court of Appeals was rendered and filed April 16, 1951. [R. pp. 268-274.]

The petition for rehearing was filed May 9, 1951, and denied May 10, 1951. [R. p. 274.]

II.

Jurisdiction.

The jurisdiction of the Secretary of Agriculture to determine the matter presented to him is set forth in the Perishable Agricultural Commodities Act of 1930, as amended, 7 U. S. C. A., Section 499 (f) (g).

The jurisdiction of the United States District Court to hear and determine, on a trial *de novo,* the appeal from the reparation order of the Secretary of Agriculture, is set forth in the Perishable Agricultural Commodities Act of 1930, as amended, 7 U. S. C. A., Section 499(g).

The jurisdiction of the United States Court of Appeals to review the judgment of the United States District Court is set forth in Section 128 of the Judicial Code, 28 U. S. C. A., Section 1291.

The jurisdiction of the United States Supreme Court to review by writ of certiorari the decision of the United States Court of Appeals is set forth in Section 240 of the Judicial Code, 28 U. S. C. A., Section 1254.

III.

Statutes and O. P. A. Regulations Involved.

This proceeding involves the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. Appx. Sec. 901, *et seq.*) and also Maximum Price Regulation No. 426 promulgated by the Price Administrator (Fed. Reg. 1943, pp. 16409-16411).

Section 901(a) of the Act provides that it is in the interests of national defense and security and necessary to the effective prosecution of the present war and that the purposes of said Act are to "stabilize prices."

The Act empowers the Price Administrator to establish maximum prices (Sec. 902).

Section 904(a) of the Act provides as follows:

> "It shall be unlawful, regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, * * * or otherwise to do or omit to do any Act in violation of any regulation or order under Section 2 * * * or of any price schedule effective in accordance with the provisions of Section 206 * * * or any regulation * * * or to offer, solicit, attempt, or agree to do any of the foregoing."

Section 921(a) of the Act provides for the creation of the Office of Price Administrator and subdivision (d) provides:

> "The Administrator may, from time to time issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act."

Section 925(a) authorizes the Administrator to apply to the courts to enjoin violations of the Act and authorizes injunctions.

Subdivision (b) authorizes fines and imprisonment for violation of the Act.

Subdivision (c) confers jurisdiction upon the District Court in the criminal proceedings for violation of Section 4 of the Act and concurrent jurisdiction with all other proceedings.

Subdivision (d) precludes damages and penalties when persons act in good faith.

Subdivision (e) authorizes purchasers of commodities sold in violation of the regulations to bring actions against the seller on account of overcharge and authorizes recovery of three times the overcharge, and also authorizes the Administrator to sue where the purchaser does not sue.

Subdivision (f) confers certain powers on the Administrator.

Subdivision (g) authorizes the District Court to enjoin orders of the Administrator.

Maximum Price Regulation 426 (Fed. Reg. 1943, pp. 16409-11) contains the following provisions:

> "Sec. 7. PROHIBITION AGAINST SALES ABOVE MAXIMUM PRICES.
>
> On and after July 20, 1943, regardless of any contract or other obligation, no person shall sell or deliver, and no person, in the course of trade or business shall buy or receive fresh fruits and vegetables at

prices higher than the maximum prices established by this regulation, and no person shall agree, offer, solicit, or attempt to do any of the foregoing. Lower prices than the maximum may be charged and paid.

* * * * * * * *

Sec. 9. ENFORCEMENT. Persons violating any provisions of this regulation are subject to criminal penalties, civil enforcement actions, suits for treble damages and proceedings for suspension of licenses provided for by the Emergency Price Control Act of 1942, as amended.

* * * * * * * *

Sec. 11. EVASION. The price limitations which are set forth in this regulation shall not be evaded, whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of or relating to fresh fruits or vegetables alone or in conjunction with any other commodity, or by way of commission, service, transportation or any other charge or discount, premium or other privilege, or by tying-agreement or other trade understanding or otherwise."

Maximum Price Regulation 426, Amendment 46 (Fed. Reg. 1944, pp. 9509-10-11) sets forth "maximum prices for table grapes." Items 3 to 6, columns 1 and 2, refer to grapes produced in Tulare County, California, with a net lug weight of 28 pounds or more. Column 3 refers to sales by lugs and column 5 refers to season from December 11th to end of season and establishes the maximum base price at $2.40.

The allowable markups over the base prices are set forth in Table A (Fed. Reg. p. 9511). The second set of figures of columns 1, 2 and 3 refer to grapes produced in Tulare County, California, with lugs of 28 pounds or

over (Items 3 to 10, Table 2). Column 4 establishes a markup of 3¢ where a grower-packer sells "Through a broker in any quantity or through a commission merchant in carlots or trucklots."

Table A, columns 8 to 12, refer to "Sales by any person (including grower-packers) through a grower's sales agent and sales by shipping point distributors" and establishes a 10¢ markup.

IV.

Statement of Facts.

A statement of the matters presented to the Secretary of Agriculture, the United States District Court and the United States Court of Appeals is set forth in the petition for writ of certiorari, under the heading "Summary and Statement of Matters Involved," and the same is hereby adopted and made a part of this brief.

The facts are as follows:

Denunzio is a car-lot receiver, jobber and service wholesaler having its place of business at Louisville, Kentucky; A. B. Rains, Jr., is a food broker at Louisville, Kentucky; Crane is a broker or car-lot distributor having his place of business at Los Angeles, California; Kazanjian is a grower and packer at Exeter, California, and also operates as a broker. [R. pp. 139, 140, 171 and 172.]

Exeter is located in Tulare County, California.

On September 26, 1944, Crane sent a form telegram to thirteen different brokers throughout the United States, stating that he could book eighteen cars of Emperor grapes, the same to go in storage commencing October 9th, shipper to transfer title on or after December 10th, packed 28 pounds net, he paying all storage charges, $500.00

part payment with confirmation, price $2.53 net to shipper, Crane charging $50.00 per car procurement charge. The telegram contained the code word "Adlam" which means "offer subject to confirmation." One of these form telegrams was sent to A. B. Rains, Jr., of Louisville, Kentucky. [R. pp. 198-202.] In a teletype conversation which followed between Crane and Rains on September 28th, Rains offered to take four cars of grapes on terms different than offered. Crane replied that the matter would have to be put up to the shipper as the deal was based exactly as we told you. [R. p. 227.]

On September 28th Crane wired Rains that it was impossible to make a deal except as quoted in his night letter (referring to his night letter of September 26th). [R. p. 203.]

On October 2nd Crane sent out another form telegram to the same brokers referring to the night letter of September 26th and quoting fifteen cars U. S. One at $2.50 net on the same deal, asking for the parties to wire quick if they wanted any part of the deal. [R. p. 205.] As the result of a teletype conversation between Crane and Rains concerning the offers to sell Emperor grapes, Rains approved a sale of three cars to Krotzki, another commission merchant that he represented [R. p. 230] and thereafter and on October 2nd Crane telegraphed Rains as follows:

> "Talked shipper Red Lyon Packing Company Confirms Kortski Necessary 750.00 car airmail deposit with signed confirmation Emperors available now Only two more cars possibly three same base." [R. p. 206.]

In a teletype conversation which occurred on October 3rd between Rains and Crane, each party orally confirmed

two cars to Krotzki and three cars to Denunzio, and Crane stated that they would airmail confirmations for buyer's signature, and Rains stated he would airmail checks with signed confirmation when he received your (Crane's) copies. [R. p. 234.]

On October 3rd Rains mailed Crane a Standard Memorandum of Sale showing two cars of grapes sold to Denunzio for account of Associated Fruit Distributors. [R. pp. 236-7-8.]

On October 3rd Crane wired Kazanjian the facts with reference to the purchases and Kazanjian wired back stating they were satisfactory but injecting some new terms into the deal. [R. pp. 217-8.]

On October 10th Crane wired Rains:

> "Shipped (r) Red Lion takes view account ceiling lifted any contracts Emperors voided * * *." [R. p. 209.]

Kazanjian refused to ship the grapes.

V.

Specifications of Error.

The Court of Appeals erred:

1. In setting aside and vacating the conclusions of law entered by Judge Carter and reversing the judgment entered by him.

2. In reinstating the findings of fact, conclusions of law and judgment of Judge O'Connor.

3. In sustaining the ruling of Judge O'Connor holding that the contract for the sale of grapes at a price in excess of the ceiling established by the Price Administrator under the provisions of the Emergency Price Control Act of 1942, as amended, is valid and enforceable.

4. In sustaining the ruling of Judge O'Connor holding that an action for damages will lie for the breach of a contract for the sale of grapes at a price in excess of the ceiling established by the Price Administrator under the provisions of the Emergency Price Control Act of 1942, as amended.

VI.

Summary of Argument.

Point "A". A contract for the sale of merchandise at a price in excess of the ceiling established by the Price Administrator under the provisions of the Emergency Price Control Act is void and unenforceable.

Point "B". A contract for the sale of merchandise at a price in excess of the ceiling established by the Price Administrator under the provisions of the Emergency Price Control Act, cannot be the basis of an action for damages by the buyer against the seller, where the seller refuses to carry out the contract.

Point "C". The payment of the O. P. A. ceiling to the seller and the payment of a commission to the seller's agent voided the contract.

Point "D". The equities of this case demand a reversal of the Court of Appeals judgment.

Point "E". Decisions under the Sherman Anti-Trust Act hold contracts entered into in violation thereof to be void and unenforceable.

Point "F". The decision of this Court in the case of *Bruce's Juices v. American Can Co.* does not hold that the seller may recover damages for breach of an unlawful contract.

Point "G". Contentions urged by Denunzio before the Court of Appeals are without merit.

ARGUMENT.

POINT A.

A Contract for the Sale of Merchandise at a Price in Excess of the Ceiling Established by the Price Administrator Under the Provisions of the Emergency Price Control Act Is Void and Unenforceable.

Under Section III hereof we quoted Section 904(a) of the Emergency Price Control Act wherein Congress stated it shall be "unlawful" to sell or deliver or to buy or receive any commodity or to do any act in violation of any regulation or order or price schedule or to offer to do so.

Maximum Price Regulation 426, Section 7, prohibits the sale or purchase of fruits or vegetables at prices higher than the maximum prices established by said regulation, and Section 9 provides for enforcement of the Act by criminal penalties, civil enforcement actions, suits for treble damages and for suspension of licenses, and Section 11 provides that the price limitations are not to be evaded by direct or indirect methods or by way of commission. (Sec. III hereof for text of regulations.)

The effect of the statute and regulations upon a contract in violation thereof, is to make the same void and unenforceable.

The general rule with reference to unlawful contracts and the effect of illegality is set forth in 12 Am. Jur., page 652, *et seq.*, as follows:

> "It is a general rule that an agreement which violates a provision of a Constitution or of a constitutional statute or which cannot be performed without violation of such a provision is illegal and void. * * * This is the general rule whether the con-

sideration to be performed or the act to be done is unlawful. Thus, a promise made in consideration of an act which is forbidden by the United States Constitution is illegal. An agreement in violation of a law is illegal whatever may have been theretofore decided by the courts to have been the public policy of the country on the subject." (Sec. 158.)

"So far as contracts in violation of statute are concerned, it may be said, speaking generally, that there is no distinction between acts *mala in se* and acts *mala prohibita*. Where a statute intends to prohibit an act, it must be held that its violation is illegal, * * *. It is equally unfit that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing is prohibited because it is against good morals or because it is against the interest of the state. * * *" (Sec. 159.)

"An agreement directly and explicitly prohibited by a constitutional statute in unmistakable language is ordinarily void and no recovery can be had thereon. When a contract, express or implied, is tainted with the vice of violation of law as to the consideration or the thing to be done, no alleged right founded upon it can be enforced in a court of justice. Moreover, where one of the parties thereto has performed in whole or in part, he cannot avoid the contract and recover reasonable compensation.

It makes no difference whether the prohibition or command is expressed or implied. Even where the statute does not, in express terms, declare the act unlawful, yet if it appears, from a consideration of the terms of the legislation in question that the legislative intent was to declare the act unlawful, an agreement involving the doing of such an act is illegal. * * *" (Section 160.)

In the case of *Case v. Bowles* (1945), 327 U. S. 92, 90 L. Ed. 552, this Court held that the price regulations applied to timber on school lands sold by the State and enjoined a sale in excess of the maximum price regulations.

In the case of *Hulbert and Bowles v. Twin Falls County* (1946), 327 U. S. 103, 90 L. Ed. 560, this Court granted certiorari to review a decision of the Idaho Supreme Court because it conflicted with the decision of the Ninth Circuit Court in the case of *Bowles v. Case.* In this case Twin Falls County sought to recover $1050.00 as the purchase price of a tractor. The O. P. A. ceiling price was $723.56. The Idaho District Court held "that the sale as to the amount above that ceiling price was void." The Idaho Supreme Court reversed the District Court and this Court reversed the Idaho Supreme Court.

In the case of *Hall v. Bucher* (1950, Mo.), 227 S. W. 2d 96, plaintiff sought to recover money claimed to be due for the sale of corn. It was agreed that the price should be the highest ceiling price during a certain period. At the date of the sale the ceiling price was $1.08 a bushel which the purchaser paid. During the period referred to in the contract the ceiling price rose to $1.33⅓ a bushel. This action was to recover the difference. Defendant contended that the provision of the contract for adjusting the price upward was in violation of O. P. A. regulations. The Court held the contract for price adjustment to be void and denied recovery. The plaintiff contended that defendant induced him to enter into the contract and therefore he could not plead illegality, but Court rejected this contention stating "the law permits a party to an illegal agreement to set up the illegality as a defense even though it may be alleging his own turpitude."

In the case of *Dippel v. Brunozzi* (1950), 365 Pa. 264, 74 A. 2d 112, the Supreme Court of Pennsylvania stated with reference to Section 904 of the Emergency Price Control Act:

> "Therefore such a sale or such a purchase, during the time when the act was in effect, was against public policy and consequently unenforceable. This accords with the general rule that an agreement which violates a provision of a statute, or which cannot be performed without violation of such provision is illegal and void."

In the case of *International Spangles Corp. v. Marrow Mfg. Co.* (1945), 294 N. Y. 295, 62 N. E. 2d 77, the Court of Appeals of the State of New York denied a recovery for merchandise sold and delivered where plaintiff failed to show it had established a maximum price for the merchandise in accordance with the Emergency Price Control Act holding that the contract was legally unenforceable.

In the case of *Walker v. Bailey* (Ala., 1947), 33 So. 2d 891, the Court considered an action to recover possession of an automobile and money due on a chattel mortgage. Defendant contended the price of the automobile was in excess of O. P. A. ceiling. In denying recovery the Court stated:

> "In our opinion it is clear that under the provisions set out above that the mortgage and note which are the basis of this suit are illegal and void. The contract calling for the payment of a price above the O. P. A. ceiling is declared unlawful. A penalty is fixed for such actions. A prohibition must be implied under such conditions (citing cases). Contracts specially prohibited by law, or the enforcement of

> which violates the laws enacted for regulation and protection of private citizens are void and non-enforceable in the courts of this state (citing cases). * * * The expressed purpose and provisions of the Emergency Price Control Act we think establishes beyond argument the illegality of contracts made in violation of its provisions. Relief sought under contracts unlawful under the Emergency Price Control Act has uniformly been denied in other jurisdiction" (citing cases). (Alabama Supreme Court review denied, 33 So. 2d 898.)

In the cases of *Gales v. Wallace* (Ark., 1946), 194 S. W. 2d 881, *Scott Furniture Co. v. Maurer* (Ark., 1945), 187 S. W. 2d 185, and *El Paso Furniture Co. v. Gardner* (Texas), 182 S. W. 2d 818, plaintiffs sought to recover possession of personal property sold on a title retaining contract—the sale price being over O. P. A. ceiling. In each instance the purchaser had paid under the contract an amount equaling or in excess of ceiling. In each case the Court held plaintiffs were not entitled to any relief.

In the case of *Lewis v. Jackson* (Texas, 1947), 199 S. W. 2d 853, plaintiff sought to recover possession of an auto sold in excess of O. P. A. ceiling. Plaintiff had taken back a chattel mortgage for a part of the purchase price. The Court held the transaction to be void.

In the case of *MacRae v. Heath*, 60 Cal. App. 64, 212 Pac. 228, the Court considered the question of validity of a contract for sale of frozen fruit. The law made it unlawful to sell frozen fruit. With reference to the right to recover for frozen fruit sold and delivered to the purchaser, the Court stated that the sale is void because the

statute expressly declares it so and held that plaintiff could not recover the contract price.

In the case of *Takeuchi v. Schumuck,* 206 Cal. 782, 276 Pac. 345, the plaintiff sought to recover certain money paid as a deposit on account of the purchase price of real property. The Court denied any recovery on the ground that the attempted purchase was in violation of the Alien Land Law and illegal.

In the case of *Silverthorne v. Percey,* 120 Cal. App. 83, 71 P. 2d 746, plaintiff sought to recover a broker's commission for negotiating an exchange of real property. The agreement for the exchange of real property was illegal, as it was an attempt to sell a parcel of property by reference to an unrecorded map. The Court held that the plaintiff was not entitled to recover a commission for negotiating an illegal contract of sale.

In the case of *Kings, etc. v. Yucaipa, etc.,* 18 Cal. 2d 47, 62 P. 2d 1064, the Court held that the contract to store perishable commodities at a price less than the tariff filed with the Railroad Commission was illegal, the law expressly forbidding such contracts, and making them illegal and void. The Court denied any recovery for the warehouse charges, and denied recovery by the party storing the merchandise for claimed negligence in handling the merchandise in storage.

Clearly under the foregoing authorities the sale in question being in excess of a ceiling price was void and unenforceable.

The decision of the Court of Appeals is in conflict with the rule laid down by this Court in the case of *Hulbert and Bowles v. Twin Falls County, supra,* and the various state court decisions hereinbefore referred to.

POINT B.

A Contract for the Sale of Merchandise at a Price in Excess of the Ceiling Established by the Price Administrator Under the Provisions of the Emergency Price Control Act, Cannot Be the Basis of an Action for Damages by the Buyer Against the Seller, Where the Seller Refuses to Carry Out the Contract.

The question presented herein is an important question of Federal Law which has not been, but should be, settled by this Court.

Congress provided that a contract in violation of O. P. A. Regulations is unlawful. A contract declared to be unlawful is illegal, void and unenforceable and cannot be the basis of an action to recover damages for the breach thereof.

The only cases which we have been able to find deciding this Federal question decide same contrary to the decision of the Court of Appeals.

In the case of *Morgan Ice Co. v. Barfield* (Tex. Ct. of Civil Appeals 1945), 190 S. W. 2d 847, plaintiff sought to recover damages for the failure of defendant to deliver ice pursuant to an agreement of sale. The sales price was in excess of the O. P. A. ceiling. On appeal the Court held that the contract in question "was in violation of and prohibited by the Federal statutes and directives of the Office of Price Administration and, therefore, illegal and void." In denying recovery the Court quoted

from Section 904(a) of the Emergency Price Control Act and stated:

> "The rule is, both under the Federal and State authorities, that where parties who are charged with the knowledge of the law (the Act above referred to and the rulings and ceiling prices fixed pursuant to its provisions constitute the law), undertake to enter into a contract in violation thereof they will be left in the position in which they put themselves. The courts will not permit a recovery to either side. (Citing cases.) Before appellee would be permitted to recover damages for the breach of a contract the duty rested upon them to establish a legal contract.
>
> When the evidence shows the contract relied upon by a party is prohibited by law and therefore illegal, the courts are duty bound to dismiss such controversy, thereby denying relief to either party."

In the case of *Palmer v. Mayer* (1947), 330 Ill. App. 619, 71 N. E. 2d 822, the Court held where the purpose of a contract was to defeat the operation of the Emergency Price Control Act and regulations of the Office of Price Administration with reference to sugar and both parties to the contract knew that they were engaging in an unlawful undertaking, no recovery could be had for breach of the contract by one of the parties.

In the case of *Perma-Stone Corp. v. Merkel,* 255 Wis. 565 (1949), 39 N. W. 2d 730, plaintiff sought to foreclose a mechanic's lien for labor and materials furnished to defendant. Defendant contended the price charged

was in excess of O. P. A. ceiling. The Court denied foreclosure of the lien but awarded damages for breach of contract. In reversing the judgment the Court stated: "Plaintiff's violation of O. P. A. regulations pertaining to price is a defense in a civil action to recover damages for breach of contract."

This is not an action to recover the purchase price or the reasonable value of merchandise sold and delivered. On the contrary, it is an action to recover damages (profits Denunzio would have made) for the failure of Crane to carry out an unlawful contract. Denunzio's action is based upon an unlawful contract.

The effect of the decision of the Court of Appeals is that a seller must go through with a contract to sell merchandise at a price in excess of ceiling and subject himself to (1) criminal penalties; (2) a civil enforcement action; (3) a suit for treble damages, and (4) the suspension of his license to operate a business. A seller must subject himself to all of these burdens so that a buyer may make a profit and also recover three times the excess over the O. P. A. ceiling.

Certainly Congress never intended that such was to be the interpretation placed on one of its laws declaring a contract to sell merchandise in excess of the O. P. A. ceiling to be unlawful.

POINT C.

The Payment of the O. P. A. Ceiling to the Seller and the Payment of a Commission to the Seller's Agent Voided the Contract.

As pointed out under the statement of facts, Kazanjian was to receive $2.50 a lug for the grapes and Crane was to receive a commission of $50.00 a car, which amounted to $.0454 a lug, as found by Judge Carter. [R. p. 177.]

As pointed out under the statutes and regulations involved, the ceiling price was $2.50 a lug for a sale by Kazanjian or by Crane.

Maximum Price Regulation 426, Section 11, provides that "the price limitations * * * shall not be evaded by way of commission * * * or any other charge * * *."

The payment of the ceiling price to the seller and a commission to the seller's agent was, in effect, a payment of the total amount to the seller and the contract thereupon violated the price regulations.

In the case of *Fowler v. Equitable Trust Co.*, 141 U. S. 385, 35 L. Ed. 786, the Court held that an agreement to pay the highest rate of interest under the law to a lender of money and the payment by the borrower to the lender's agent of a commission for making the loan constituted a payment to the lender in excess of the lawful rate and "rendered this loan usurious."

In the case of *Walker v. Bailey* (Ala.), 33 So. 2d 891 the Court held that the payment by the purchaser of a part of the purchase price to the seller and a part to his agent (both amounts when added together exceeding the O.P.A. ceiling) made the contract illegal and unenforceable.

In the case of *Blumenthal v. U. S.*, 332 U. S. 539, 68 S. Ct. 248, 92 L. Ed. 154, this Court sustained a conviction for conspiracy to violate the Emergency Price Control Act in the sale of liquor where the seller was paid ceiling and certain of his intermediaries received various sums of money for their part in the transaction.

The effect of the agreement for the buyer to pay the seller the ceiling price and the seller's agent a commission, constituted a payment to the seller of a total price in excess of the ceiling and voided the contract.

POINT D.

The Equities of This Case Demand a Reversal of the Court of Appeals Judgment.

Crane offered to book grapes for Denunzio if Denunzio would pay him a procurement fee of $50.00 a car. $500.00 part payment was to be made with confirmation. [R. p. 202.] Crane never represented himself to be the owner or shipper and informed Denunzio that its counter offer must be put up to shipper. [R. p. 227.] Denunzio never paid the part payment due on confirmation. In fact he never paid anything on account of the grapes nor did he pay Crane his procurement charge. No contract for the sale of grapes was ever signed and no confirmation given as required by Crane's telegram of September 26, 1944. [R. pp. 219-20.]

Although Crane could only have made $150.00 on the deal, he was denied this amount and burdened by a judgment for $5723.50, plus interest and an attorney's fee allowed to Denunzio in the sum of $3000.00.

The equities of the case demand that this judgment be reversed.

POINT E.

Decisions Under the Sherman Anti-Trust Act Hold Contracts Entered Into in Violation Thereof to Be Void and Unenforceable.

We believe that the decisions of this Court interpreting the Sherman Anti-Trust law should be persuasive of the decision to be rendered interpreting the Emergency Price Control Act.

The Sherman Anti-Trust law provides, among other things, that every contract in restraint of trade or commerce "is hereby declared to be illegal" and also for the recovery of treble damages for a violation thereof (26 Stat. 209, Chap. 646, and Chap. 647(m); 50 Stat. 673-93, Chap. 690; 15 U. S. C. A. Section 1, 4 F. C. A. Title 15, Section 1; 38 Stat. 730, 731, Chap. 323; 15 U. S. C. A. Sections 1, 2, 7, 15, 4 F. C. A. Title 15, Sections 1, 2, 7, 15).

In the case of *Sola Electric Company v. Jefferson Electric Company,* 317 U. S. 173, 87 L. Ed. 165, the Jefferson Electric Company sought to recover certain royalty payments due under a license agreement covering a patented article. The Sola Electric Company contended that the agreement for licensing was in violation of the Sherman Anti-Trust law. In denying recovery the Court stated as follows:

> "* * * petitioner may assert the illegality of the price-fixing agreement and may offer any competent evidence to establish its illegality, including proof of the invalidity of the patent."

In the case of *Continental Wall Paper Co. v. Louis Voight, etc.* 212 U. S. 227, 53 L. Ed. 486, petitioner sought to recover for goods, wares and merchandise sold and delivered. Defendant alleged that the plaintiff was the selling agent of a combination of wall paper manufacturers and that in carrying out such combination the defendants were compelled to sign a jobber's agreement which in effect bound them to buy from the plaintiff all the wall paper needed in their business at certain fixed prices, and not to sell the same at lower prices or upon better terms than those upon which the plaintiff itself sells to dealers other than the jobbers. The defendant further alleged that the goods sued for were ordered pursuant to such agreement and at the prices fixed and that such prices were unreasonable and that the transactions between the parties were in furtherance of an illegal combination. In sustaining the defense the Supreme Court stated the rule as follows:

> "The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, to which both the plaintiff and the defendant were parties, and *pursuant to which* the accounts sued on were made out, and which had for their object and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall Paper Company was organized. If judgment be given for the plaintiff the result beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination."

See also:

Bennett v. National, Etc., 186 U. S. 70, 46 L. Ed. 1058.

It will thus be seen that under the Sherman Anti-Trust Act the Courts hold that a contract entered into in violation of the Act is void and unenforceable even though the Act itself provides for a recovery of treble damages.

This rule as applied to the case at bar would justify this Court in holding the contract relied upon to be illegal and not the basis of an action for damages for failure to deliver under the void contract.

POINT F.

The Decision of This Court in the Case of Bruce's Juices v. American Can Co. Does Not Hold That the Seller May Recover Damages for Breach of an Unlawful Contract.

In the brief of Denunzio before the Court of Appeals it took the position that contracts in violation of the statutes, where the phraseology is similar to that used in the Emergency Price Control Act, have been held enforceable and cited the decision of this Court in the case of *Bruce's Juices v. American Can Co.,* 330 U. S. 743, 91 L. Ed. 1219, as supporting this contention. The same argument was advanced in the case of *Walker v. Bailey,* hereinafter referred to.

We submit that the *Bruce's Juices* case does not sustain this contention and that other courts in analyzing said case have so held.

In the *Bruce's Juices* case the American Can Company sought to recover $114,000.00 on certain renewal notes, the originals of which were given for the purchase price of cans sold and delivered to Bruce's Juices. Bruce's Juices contended that the consideration for the notes was illegal and that the notes were void for the reason that the Can Co. had sold cans to others at prices which discriminated against Bruice's Juices, thereby violating the Robinson-Patman Act. Section 3 of the Robinson-Patman Act makes it "unlawful" for any person to be a party to any sale which discriminates against competitors of a purchaser, by granting discounts, etc. In the course of the majortiy opinion the Court considers the question as to whether or not the sanctions provided by the Act prevent collection of the purchase price. A violation of the Act is made a crime and a person injured is given the right to recover threefold damages sustained by him. The majority opinion allowed recovery. In analyzing the evidence the Court pointed out that "It cannot be said that the notes represent the separate items of price discrimination." It further pointed out that "the violation, if there was one, is not inherent in the contract sued upon, whether it be the notes or the sale of the goods, but can only be found in different transactions which a party to the litigation had with third persons."

While there is considerable argument in the Court's opinion as to whether or not the claim of illegality would prevent recovery on the notes, the Court takes the position that the illegality did not arise out of the sale of cans and

therefore the seller was entitled to recover the purchase price.

That this Court only held that a purchaser could not secure merchandise and refuse to pay for same on the ground that the sale was illegal, is shown in the analysis of this Court's opinion by the United States Courts of Appeal for the Second and Seventh Circuits.

In speaking of the case of *Bruce's Juices* the 2nd Circuit stated (*Vines v. General Outdoor Advertising Co.*, 171 F. 2d 487) that case "held that the buyer of goods from a seller, who is engaged in violating such a statute, may not keep the goods without paying the price. The theory was that the seller's unlawful enterprise did not forfeit his title to the goods and that, since the buyer got his own title from the seller, he was obliged to conform to the conditions imposed upon its transfer."

In the case of *Turner Glass Corp. v. Hartford Empire Co.*, 7th Circuit, 173 F. 2d 49, the Court cited the *Bruce's Juices* case as supporting "the proposition that the courts recognize the distinction between inherent and collateral illegality arising out of anti-trust violations * * *. But when the contract sued upon is not intrinsically illegal, the court has refused to allow property to be obtained under a contract of sale without enforcing the duty to pay for it because of violation of the Sherman Act not inhering in the particular contract in suit * * *."

In the case of *Walker v. Bailey* (Ala. 1947), 33 So. 2d 891, the Court considered an action to recover the pos-

session of an automobile and money due on a chattel mortgage. Defendant contended the price of the automobile was in excess of the O. P. A. ceiling. In this case defendant contended that because of the recent United States Supreme Court decision in the case of *Bruce's Juices v. American Can Co.* and in view of the action for treble damages given the purchaser of over-ceiling priced commodities under Section 925(c) that contracts violative of the Emergency Price Control Act should be enforced in full and the victimized purchaser left to his remedy under Section 925(c). With reference to this contention the Supreme Court of Alabama stated:

> "The fact that the purchaser is granted in a separate section a right to, and may, if he chooses, attempt to collect damages, where he is the victim of a sale involving over ceiling prices can in no way operate to validate a contract specifically declared unlawful by the act prohibiting such contracts. The expressed purpose and provisions of the Emergency Price Control Act we think establishes beyond argument the illegality of contracts made in violation of its provisions. Relief sought under contracts unlawful under the Emergency Price Control Act has uniformly been denied in other jurisdiction" (citing cases).

From the foregoing it will be seen that the *Bruce's Juices* case does not hold that a contract inherently illegal, that is a contract entered into in violation of the law, or declared to be unlawful, can be the basis of an action to recover on the contract.

POINT G.

Contentions Urged by Denunzio Before the Court of Appeals Are Without Merit.

In its brief before the Court of Appeals, Denunzio urged certain contentions and presented authorities in support of said contentions. The Court of Appeals did not set forth in its opinion the reason upon which it relied to reverse the judgment of Judge Carter. It therefore becomes necessary for us to discuss the arguments presented by Denunzio to the Court of Appeals and point out that they are not sufficient to defeat our claim of illegality and unenforceability of the contract relied upon.

The main contention of Denunzio before the Court of Appeals was that the Emergency Price Control Act, as amended, and the orders and regulations of the Price Administrator, set forth certain penalties for their violation and such penalties do not include the unenforceability of a contract made in violation thereof, therefore the contract is enforceable.

The first case cited by Denunzio under this point was the case of *Bentley v. Hurlbut,* 153 Cal. 796, 96 Pac. 890. In this case the Court recognized the rule that the penalty in the statute implies a prohibition and that no recovery can be had on a contract made in violation of a statutory prohibition, but stated that this rule is not without exception. In this case, however, the Court held that the contract in question did not violate the law and therefore recovery could be had thereon.

The next case referred to by Denunzio is the case of *Harris v. Runnels.* 12 How. 79, 53 U. S. 79, 13 Law. Ed. 901. In this case the Court recognized the rule that contracts in violation of statutes are void, but held that where

a purchaser of slaves received same he could not refuse to pay therefor even though the slaves had been illegally imported into the state in which they were sold.

The next case relied upon by Denunzio is the case of *Gammon v. Howard W. Scott, Inc.* (4th Circuit), 16 F. 2d 902. In this case the Court held that a non-resident corporation had a right to sue in the Federal Court and that this right could not be taken away by a state law.

The next case cited by Denunzio is the case of *Macco Const. Co. v. Farr* (9th Circuit), 137 F. 2d 52. This was an action for damages for breach of a contract to haul dirt which Macco was excavating. Without pleading illegality Macco at the trial contended that Farr was not entitled to recover because he had not obtained a permit from the Railroad Commission of California permitting transportation of property by trucks over public highways. Farr contended that the contract did not require the use of public highways and the trial court accepted this contention and found that the contract did not contemplate an illegal object.

The next case referred to by Denunzio is the case of *McBroom v. Scottish Mortgage, Etc.*, 153 U. S. 318, 14 S. Ct. 852, 38 Law. Ed. 729. This case holds that a contract for a loan providing for a usurious rate of interest is not void except for the interest in excess of that which could be lawfully charged, collected and received.

The next case referred to by Denunzio under this point is the case of *Miller v. Long Bell Lumber Co.* (Texas 1949), 222 S. W. 2d 244. This was an action to recover for merchandise sold and delivered. Miller contended that he was not liable for the reason that the lumber company had charged prices in excess of the O. P. A. ceiling. The

lumber company was awarded judgment for the amount for which Miller had been billed, less the sum by which said amount exceeded the O. P. A. ceiling. On appeal Miller contended that the case should be governed by the rule that courts will not lend their aid in support of illegal contracts. The Court held the overcharge to be unintentional and governed by that provision of the statute which provided merely for a return of the amount of the overcharge where same was unintentional.

The next case relied upon by Denunzio is the case of *Bruce's Juices v. American Can Co.*, 330 U. S. 743, 91 L. Ed. 1219. This case has already been considered by us.

Denunzio then refers to certain cases involving licensing statutes but concedes that they are not directly applicable to the instant case, therefore we will not refer further to same.

Under this point Denunzio further goes into the matter of legislative history of the Emergency Price Control Act and points out that the House of Representatives' version of the bill provided that contracts in violation of the price ceiling under the bill were "unenforceable" and that the Senate's version of the bill provided for (1) injunction, (2) criminal penalties, (3) suit for damages, and (4) revocation of license and that after conference the Senate's version was adopted. This statement is not supported by the record nor by the references given by Denunzio. The Emergency Price Control Act, as finally enacted by Congress, provides "It shall be unlawful * * * for any person to violate the Act or any regulations or orders of the Price Administrator." (Sec. 904(a).)

From the foregoing it will be seen that Congress did not adopt either the House or the Senate version of this

bill but provided that it was "unlawful" to violate the Act or any regulation or price schedule.

Another contention urged by Denunzio was that the O.P.A. ceiling was $2.53 a lug and not $2.50 a lug. The provisions of the price regulations and ceiling are set forth under subdivision III of the brief entitled *"Statutes and O.P.A. Regulations Involved."* Crane was a broker or car-lot distributor and his ceiling would be $2.40, plus a 10¢ markup, as shown by Table 2, Column 8 of Table A. Kazanjian was a grower-packer and in the event he sold "through a broker or salaried representative" then his markup would be 13¢ above the $2.40 base. (Column 9.) In view of the fact that Kazanjian was not paying Crane or any other person for making the sale it cannot be contended that the sale was being made "through a broker or salaried representative." The sale, if made by Kazanjian, was a direct sale without a broker and his markup was 10¢a lug under Column 8. The purpose of granting a grower-packer a 13¢ markup was because he was put to an expense in connection with the sale, that is, the payment of a commission or the salary of a salaried representative. There being no expense to Kazanjian there was no reason for him being entitled to the 13¢ markup.

The next contention urged by Denunzio was that a contract is presumed to be lawful. We have no quarrel with this contention.

The next contention urged by Denunzio is that if illegality does not appear on the face of the contract, the illegality must be alleged and proved. Our answer to this contention is threefold: first, invalidity was alleged; second, the case was tried on the theory that the contract

was illegal, and third, when illegality appears the Court must refuse to entertain the action. [R. pp. 49-50.]

The case was tried on the theory that the contract in question was invalid. This is shown by Judge O'Connor's opinion. [R. pp. 101-2, 120 to 129.]

Where an action is tried and evidence introduced on the theory that a material issue has been raised and the Court renders a judgment on that theory, the parties will not be allowed to say for the first time on appeal that there was no such issue.

See the following cases:

Grimes v. Nicholson, 71 Cal. App. 2d 538, 162 P. 2d 934;

Schroeder v. Mauzy, 16 Cal. App. 443, 447, 118 Pac. 459;

Sprigg v. Barber, 122 Cal. 573, 579, 55 Pac. 419;

Illinois T. & S. Bank v. Pacific Ry. Co., 115 Cal. 285, 297, 47 Pac. 60;

National Union Fire Ins. Co. v. Nason, 21 Cal. App. 297, 299, 131 Pac. 755.

Whenever illegality appears in the course of a trial it becomes the duty of the Court to refuse to entertain the action. This rule is supported by the following authorities:

6 *Cal. Jur.,* p. 162, Sec. 112;

Dean v. McNerney, 91 Cal. App. 206, 266 Pac. 975;

Endicott v. Rosenthal, 216 Cal. 721, 16 P. 2d 673;

Morey v. Paladini, 187 Cal. 727, 203 Pac. 760.

The cases which were relied upon by Denunzio before the Court of Appeals in connection with this point are all cases where the question of illegality had not been tried by the lower court and was presented for the first time on appeal. The Appellate Court in each instance refused to consider same.

The next point urged by Denunzio before the Court of Appeals was that no evidence of illegality of contract was introduced. The evidence on the so-called replacement cars shows that one car contained 1100 lugs, and the other two cars each contained 1105 lugs. [R. pp. 42, 47, 48.] The evidence before the trial court showed that a carload of grapes contains from 775 lugs to 1170 lugs and that the average car contained 1100 lugs. This evidence clearly justified Judge Carter holding that the price Denunzio agreed to pay was $2.5454 a lug, which was clearly in excess of the O.P.A. ceiling and illegal. [R. p. 177.]

The next contention urged by Denunzio was that the contract price did not exceed the O.P.A. regulations by more than 6/100 of 1%. As heretofore pointed out, the price ceiling was $2.50 a lug on a sale by either Kazanjian or Crane and the overcharge is 1.816% of the sale price of each lug, based on 1100 as the average number of lugs in the car.

In view of the fact that the Emergency Price Control Act and the Maximum Price Regulations were adopted to "stabilize prices" "in the interests of national defense and security" and necessary to the "effective prosecutior

of the present war," it is clear that the *de minimis* doctrine would not apply. It was a matter of public concern to keep prices down.

The next point urged by Denunzio was that the Court may use its discretion in applying the statutory remedy provided by the Emergency Price Control Act and may use its discretion in applying remedies not called for by the statutes. An examination of the Emergency Price Control Act and the cases relied upon by Denunzio will show that this contention only arises on the matter of an injunction—not an action for damages for breach of contract.

The next contention urged by Denunzio is that the contract is severable and the legal portion may be enforced.

In Judge O'Connor's opinion he pointed out that the contract had two objects, one the sale of grapes and the other the payment of a commission to Crane. that the contract for the sale of grapes was at the ceiling price and therefore valid, but the contract to pay Crane a commission was void. [R. p. 129.]

We submit that the contract, if Crane negotiated one, was for the sale of grapes, that all Denunzio was interested in was procuring grapes, and all Crane and Kazanjian were interested in was selling grapes. The purchase and sale of grapes were the only objects of the contract. The payment of a commission to Crane was only an incident to the contract—it was not an object of the contract.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that justice may be done, and that to such end a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals for the Ninth Circuit, and reverse same and direct that the judgment of Judge James M. Carter be reinstated.

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IN THE

Supreme Court of the United States

October Term, 1951.

No. 109.

RAYMOND M. CRANE, Doing Business as Associated Fruit Distributors, - - Petitioner,

versus.

JOSEPH DENUNZIO FRUIT COMPANY, a Corporation, and JOHN C. KAZANJIAN, Doing Business as Red Lion Packing Company, - - Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT, JOSEPH DENUNZIO FRUIT COMPANY, IN OPPOSITION.

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IN THE

Supreme Court of the United States

October Term, 1951.

No. 109.

RAYMOND M. CRANE, DOING BUSINESS AS ASSOCIATED FRUIT DISTRIBUTORS, - *Petitioner,*

v.

JOSEPH DENUNZIO FRUIT COMPANY, A CORPORATION, AND JOHN C. KAZANJIAN, DOING BUSINESS AS RED LION PACKING COMPANY, - *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT, JOSEPH DENUNZIO FRUIT COMPANY, IN OPPOSITION.

I.

Opinions of Courts Below and of Secretary of Agriculture.

The order of the Secretary of Agriculture is dated February 26, 1947, and his decision is reported in 6 Agricultural Decisions 139 (R., pp. 63-79).

The judgment of Judge O'Connor was docketed July 21, 1948, and his opinion is reported in 79 Fed. Supp. 117 (R., pp. 82-137, 139-152).

The judgment of Judge Carter was entered May 19, 1950, and his opinion is reported in 89 Fed. Supp. 962 (R., pp. 164-184).

The decision of the United States Court of Appeals was rendered and filed April 16, 1951, and is reported in 188 Fed. 2d 569 (R., pp. 268-274).

The petition for rehearing was filed May 9, 1951, and denied May 10, 1951 (See 188 Fed. 2d 569) (R., p. 274).

II.

Jurisdiction.

The jurisdiction of the Secretary of Agriculture to determine the matter presented to him is set forth in the Perishable Agricultural Commodities Act of 1930, as amended, 7 U. S. C. A., Section 499(f)(g).

The jurisdiction of the United States District Court to hear and determine, on a trial *de novo,* the appeal from the reparation order of the Secretary of Agriculture, is set forth in the Perishable Agricultural Commodities Act of 1930, as amended, 7 U. S. C. A., Section 499(g).

The jurisdiction of the United States Court of Appeals to review the judgment of the United States District Court is set forth in Section 128 of the Judicial Code, 28 U. S. C. A., Section 1291.

The jurisdiction of the United States Supreme Court to review by writ of certiorari the decision of

the United States Court of Appeals is set forth in Section 240 of the Judicial Code, 28 U. S. C. A., Section 1254.

III.

Statutes and Regulations Involved.

This proceeding involves the Emergency Price Control Act of 1942, as amended (50 U. S. C. A., Appx., Sec. 901, *et seq.*), and also Maximum Price Regulation No. 426 promulgated by the Price Administrator (Fed. Reg. 1943, pp. 16409-16411). Pertinent sections of the Act are cited and referred to in pages 11 to 13 of Petitioner's Brief.

IV.

Statement of Facts.

While petitioner's statement of facts, appearing on pages 14-16 of his brief, is extremely short, we deem it sufficient for the purpose of determining whether certiorari shall or shall not be granted.

V.

Questions Involved.

In his Petition for Writ of Certiorari, petitioner poses the following two questions:

> "1. Is a contract for the sale of merchandise at a price in excess of the ceiling established by the Price Administrator under the provisions of the Emergency Price Control Act, valid and enforceable?

"2. Can a contract for the sale of merchandise at a price in excess of the ceiling established by the Price Administrator under the provisions of the Emergency Price Control Act, be the basis of an action for damages by the buyer against the seller, where the seller refuses to carry out said contract?"

Respondent, in answer to the above questions, states, first, that the contract involved was not proven to be in excess of the established ceiling price, and, second, if so, nevertheless, the contract is valid and enforceable and may be the basis of an action for damages by the buyer where the seller repudiates the contract after the removal of the established ceiling price.

VI.

Reasons Relied Upon for Denial of Writ.

Respondent contends that the Writ of Certiorari prayed for should be denied for the following reasons:

1. The Court of Appeals for the Ninth Circuit, in ordering the reinstatement in this case of Judge J. F. T. O'Connor's findings of fact, conclusions of law and judgment, was correct in its decision of this case. Such decision is in accord with previous decisions of said Court of Appeals and with decisions of this Court. *Macco Construction Co.* v. *Farr,* 137 F. 2d 52; *McBroom* v. *Scottish Mortgage Land and Investment Co.,* 153 U. S. 318, 14 S. Ct. 852, 38 L. Ed. 729. *Bruce's Juices* v. *American Can Co.,* 330 U. S. 743, 91 L. Ed. 1219. (These cases are discussed in the Argument.)

2. The question presented herein is not of sufficient importance or gravity to require granting the writ, especially in view of the fact that the Emergency Price Control Act terminated on June 30, 1947, and is no longer in effect.

3. The question presented herein has heretofore been settled by this Court in a decision construing a similar statute. See *Bruce's Juices* v. *American Can Co., supra,* hereinafter discussed.

4. This case involves the construction of a Federal statute and the legal consequences flowing from a violation thereof. While the decision of the Court of Appeals for the Ninth Circuit may be in conflict with decisions of some State courts of last resort, nevertheless, the decision of the Ninth Circuit being in accord with decisions of this Court, the conflict with some State courts is not sufficient to grant certiorari. As this Court said, in *Sola Electric Company* v. *Jefferson Electric Company,* 317 U. S. 173, 87 L. Ed. 165:

> "When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. Const. Art. 6, cl. 2; Awotin v. Atlas Exch. Bank, 295 U. S. 209, 79 L. Ed. 1393, 55 S. Ct. 674; Dietrick v. Greaney, 309 U. S. 190, 200, 201, 84 L. Ed. 694, 700, 701, 60 S. Ct. 480."

5. There is no uncertainty arising out of the opinion of this Court in the case of *Bruce's Juices* v. *American Can Co., supra.*

VII.

Summary of Argument.

Point 1. The contract in this case was not proven to be in excess of the established ceiling.

(a) The applicable maximum ceiling price for Emperor grapes was $2.53 per lug, not $2.50 per lug.
(b) A contract is presumed to be lawful.
(c) If the illegality does not appear upon the face of the contract, then it must be alleged and proven.
(d) No evidence of illegality of contract introduced.

Point 2. Contract could not exceed O.P.A. Price Regulation by more than six one-hundredths of one per cent.

Point 3. The Emergency Price Control Act of 1942, as amended, sets forth the penalties for its violation. Such penalties do not include unenforceability of a contract in violation thereof.

(a) The unenforceability of contracts in violation of statute as affected by legislative intent.
(b) Legislative history of Emergency Price Control Act.

(c) Decisions on unenforceability of contracts under the Emergency Price Control Act.

(d) Decisions on enforceability of contracts in violation of similarly worded statutes.

Point 4. There is no conflict in other Federal decisions with the decision in the case of *Bruce's Juices* v. *American Can Company, supra.*

Point 5. In any case the contract is severable and the legal portion may be enforced.

Point 6. Equities of the case.

Point 7. Decisions under the Sherman Act not applicable.

VIII.

ARGUMENT.

Point 1.

The Contract in This Case Was Not Proven To Be in Excess of the Established Ceiling.

(A) THE APPLICABLE MAXIMUM CEILING PRICE FOR EMPEROR GRAPES WAS $2.53 PER LUG, NOT $2.50 PER LUG.

Judge O'Connor in his Findings, adopted by the Court of Appeals, found the applicable maximum ceiling price to be $2.53 per lug (Finding of Fact II, R., p. 140). If the applicable ceiling price was $2.53 per lug, then a contract requiring a price of $2.50 per lug plus a procurement charge of $50.00 *per car* would not be illegal on its face. Under such circumstances, it would be up to the party contending that such a con-

tract was illegal to raise this as an affirmative defense and to prove that on the basis of the car-loadings contemplated under the contract, $50.00 per car amounts to more than 3¢ per lug. This the petitioner Crane failed to do.

The regulation of the Office of Price Administration applicable to this contract was MPR 426, Amendment 46, August 2, 1944. The second page of this regulation sets forth the basic price for "table grapes" produced in all other areas (other than Riverside and Imperial Counties of California and in Arizona) and packed in lug boxes (WPB L 232 No. 46) with a net weight of 28 lbs. or more, sold between December 11th and the end of the season at $2.40 per lug. This far all parties interpret the regulation the same.

The third page of the regulation provides for "maximum mark-ups for distributive services performed by grower-packers, shipping point distributors, and their agents to be added to the applicable maximum price F.O.B. shipping point or the maximum delivered price, as the case may be." Column 2 gives the commodity—"table grapes"; column 3 gives the unit—"lug book (box) with a net weight of 28 lbs. or more"; columns 8 to 12, inclusive, provide for "sales by *any person* (including grower-packers) through a growers' sales agent and sales by shipping point distributors"; column 8 provides for mark-up in case of "direct sales (without the use of broker or any other agent)" and provides for a mark-up of 10¢; column 9 provides for mark-up for a sale "through a broker or salaried representative in any quantity, or through a commission

merchant in car lots or truck lots" of 13¢ per lug. It is obvious that column 9 indicates the proper mark-up in the present situation where the sale was handled in car lots through commission merchant petitioner Crane. Therefore, it is apparent that the ceiling price applicable to this transaction was $2.53.

(B) A CONTRACT IS PRESUMED TO BE LAWFUL.

Section 1643 of the Civil Code of California provides as follows:

> "A contract must receive such interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

In *Howard* v. *Adams,* 16 Cal. 2d 253, at page 256, 105 P. 2d 971, 130 A. L. R. 1003, the court states:

> "The principal contention urged on this appeal is that the agreement was void as against public policy and therefore the trial court erred in permitting plaintiff to recover upon it. Bearing in mind the rule that a contract should, if possible, be construed to make it valid and enforceable, we cannot agree that illegality is established."

The laws presumes in favor of the validity of contracts. This has been the law in California since *Shaver* v. *Bear River and Auburn W. & M. Company,* 10 Cal. 396 (1858).*

*Counsel stipulated that the substantive law of the State of California (statutory and case) shall control.

Parties are to be given the widest latitude to make contracts with reference to their private interests and the invalidity of such contracts is never to be inferred, but must be clearly made to appear. (*Herriman* v. *Menzies,* 115 Cal. 16, 44 Pac. 660, 35 L. R. A. 318.)

All intendments being against fraud and in favor of fair dealing, it will not be presumed against any writing that it contemplates a violation of the law, unless that conclusion becomes irresistible from the very reading of the instrument. (*Wood* v. *Woods Estate,* 137 Cal. 148, 69 Pac. 981.)

(C) IF THE ILLEGALITY DOES NOT APPEAR UPON THE FACE OF THE CONTRACT, THEN IT MUST BE ALLEGED AND PROVEN.

In this brief, we are not speaking of a situation in which illegality is apparent upon the face of the contract. If such illegality is apparent, then the court itself may refuse to entertain the action. We are speaking of a situation in which a reading of the contract alone will not disclose any illegality.

In *Bernard* v. *Sloan,* 2 Cal. App. 737, 84 Pac. 232, the defendants did not plead in their answer a defense that the contract was illegal because in restraint of trade. The court held that no presumption can be indulged that a contract which has no semblance of illegality in its terms is violative of any law.

In *Grimes* v. *Nicholson,* 71 Cal. App. 2d 538, 162 P. 2d 934, the court said:

> "Appellant's contention that the contract is in violation of the regulations of the Office of Price Administration by reason of the fact that it pro-

vided for charges for the use of respondent's equipment not allowed by said regulations, is not sustained by the record. It is presumed 'that private transactions have been fair and regular' and 'that the law has been obeyed.' (Code of Civil Procedure Section 1963, Subdivisions 19 and 33.) The contract is valid on its face. If facts existed that tended to prove its invalidity and to overcome the presumption, the burden rested upon appellant to prove such facts. He failed to do so."

In *Gelb* v. *Benjamin,* 78 Cal. App. 2d 881, 178 P. 2d 476, the defendant for the first time, on appeal, set up a contention that the contract sued upon was contrary to the provisions of the Emergency Price Control Act of 1942, as amended, and that it was, therefore, illegal and unenforceable. Beginning at page 883, the court states:

"This defense is raised for the first time on appeal and it was in no way pleaded or presented in the trial court. The Price Control Regulations relied on contain a number of exceptions, and no evidence having been received in this connection, there is no evidence to indicate in any way that the facts of this case did not come within one or more of these exceptions. From a reading of these regulations it cannot certainly be said that any approval was necessary here.

"While the appellants contend that the question of illegality may be raised at any time, this is true only where the illegality clearly appears. The facts alleged in the complaint in this action do not show on their face that the contract sued upon was unlawful. Under such circumstances, *illegality is*

an affirmative defense that must be specially pleaded. Bernstein v. *Downes,* 112 Cal. 197, 44 Pac. 557." (Emphasis added.)

(D) NO EVIDENCE OF ILLEGALITY OF CONTRACT INTRODUCED.

In the instant case, no illegality is shown on the face of the contract nor has an affirmative defense of illegality been raised by amended answer, nor has evidence of illegality been introduced. The only evidence on the number of lugs in a car load of Emperor grapes is the evidence of the number of lugs that went into the replacement cars. The replacement car purchase from Simons & French Company contained 1,100 lugs. The replacement cars purchased from A. Arena & Co., Ltd., each contained 1,105 lugs. If the court is willing to assume that the three cars to be supplied by Crane were each to contain 1,100 lugs, this would make the commission to Crane amount to approximately 4½¢ per lug. We don't believe that the court is justified in making this assumption if the result is to declare the whole contract null and void. We submit that if the petitioner Crane desires such a result, he was duty bound to submit evidence showing the number of crates that it was understood would be shipped in each of the three cars or to submit evidence of maximum and minimum loadings under the tariff regulations of the various loading points and destination points and the extent to which these were modified by emergency regulations during the war. This he did not do. Also MPR 426, Section 13, provides for "adjustable pricing" under certain

circumstances. There is no evidence that this case did not come within such an exception or any other exception to the maximum price regulation.

Point 2.

Contract Could Not Exceed O. P. A. Price Regulation by More Than Six One Hundredths of One Per Cent.

If the court does feel justified in assuming that the contract contemplated cars of 1,100 lugs each, and further feels justified in assuming the sale did not come within an exception to the $2.53 per lug maximum price, then $2.53 per lug amounted to $2,783.00 per car while the price to be charged Denunzio for a car of Emperor grapes plus commission (based upon this same assumption of 1,100 lugs to a car) was $2,800.00 or a possible overcharge of $17.00. This is a maximum possibile overcharge of approximately six-one-hundredths of one per cent. Petitioner Crane is asking that the whole transaction be declared null and void because of such a minor, technical and unintentional overcharge.

Point 3.

The Emergency Price Control Act of 1942, As Amended, Sets Forth the Penalties for Its Violation. Such Penalties Do Not Include Unenforceability of a Contract in Violation Thereof.

(A) THE UNENFORCEABILITY OF CONTRACTS IN VIOLATION OF STATUTE AS AFFECTED BY LEGISLATIVE INTENT.

A contract in violation of the Emergency Price Control Act of 1942, as amended, is not unenforceable. The statute itself sets forth the remedies for such violation.

As pointed out by Judge O'Connor in his opinion in the instant case (79 F. Supp. 117) a contract in violation of a statute is not necessarily void or unenforceable, and whether such a result is reached by the court depends upon its interpretation of the intent of the legislative body enacting the statute.

This court, in the case of *Harris* v. *Runnels,* 12 How. (U. S.) 79, 53 U. S. 79, 13 L. Ed. 901, which was a suit on a note given for slaves brought into Mississippi contrary to a statute of that state, said relative to statutes prohibiting things to be done:

> "Before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, the statute must be examined as a whole, to find out whether the makers of it meant that a contract in contravention of it should be void, or that it was not to be so."

Other cases supporting this proposition of law are:

Gammon v. *Howard W. Scott, Inc.,* 4 Cir., 16 F. 2d 902 (statute regulating foreign corporations);

Macco Construction Company v. *Farr,* 9 Cir., 137 F. 2d 52 (statute regulating contract carriers);

McBroom v. *Scottish Mortgage & Land Investment Company,* 153 U. S. 318, 323, 14 Sup. Ct. 852, 854, 38 L. Ed. 729 (statute regulating payment of interest).

(B) LEGISLATIVE HISTORY OF EMERGENCY PRICE CONTROL ACT.

An examination of the legislative history of the Emergency Price Control Act of 1942, as amended (50 U. S. C. A., Section 901, *et seq.*) shows that the House of Representatives' version of the bill provided a special section in which contracts in violation of the price ceilings established under the bill are "unenforceable." The Senate version of the bill did not contain this provision but contained four specific methods of enforcement of the Act: (1) injunction; (2) criminal penalties for wilful violations; (3) suit for damages; and (4) issuance of licenses and revocation thereof in case of more than one violation. After conference between the Senate and the House, the Senate version was adopted and was signed into law. The details of the history of the bill on this point are as follows:

The House report on its version of the bill is designated as "77th Congress, 2nd Session, House Report No. 1409, November 7, 1941." It can be found in Pike and Fischer, OPA Price Service—General Desk Book, Volume 1.

The Senate report on its version of the bill is designated "77th Congress, 2nd Session, Senate Report No. 931, January 2, 1942." It can be found at page 1215 of Pike and Fischer, OPA Price Service, General Desk Book, Volume 1, as follows:

> "The House bill contained a provision making unlawful contracts requiring the payment of prices in excess of the maximum prices which had been established at the time such contracts were entered into or which were thereafter established. This

> the committee regarded as *unduly restrictive,* especially in connection with War and Navy Department contracts. *Accordingly, that provision has been deleted so that all contracts are subject to whatever provisions regarding them are contained in the regulations or orders prescribing maximum prices."* (Emphasis added.)

The Senate version of the bill was adopted by the Congress and signed into law by the President. The proposed "unenforceable" section of the House bill was deleted.

The legislation as it finally became law, then, provided, in the words of the Senate report, *supra,* "that all contracts are subject to whatever provisions regarding them are contained in the regulations or orders prescribing maximum prices."

The applicable regulation in the instant case—MPR 426—"Fresh fruits and vegetables for table use, sales except at retail"—provides as follows:

> "Section 9, Enforcement. Persons violating any provisions of this regulation are subject to criminal penalties, *civil enforcement actions,* suits for treble damages and proceedings for suspension of licenses provided by the Emergency Price Control Act of 1942, as amended." (Emphasis added.)

MPR 426 does not declare void any contract for the sale of any commodity over ceiling price. See Section 7, MPR 426.

(C) DECISIONS ON UNENFORCEABILITY OF CONTRACTS UNDER THE EMERGENCY PRICE CONTROL ACT.

Judge Carter, in his opinion in this case, relied strongly upon the holding in *Morgan Ice Company* v. *Barfield,* Texas Civil Appeal 1945, 190 S. W. 2d 847. Petitioner, likewise, relies upon this case as being contrary to the decision of the Court of Appeals. The *Morgan Ice Company* case was decided by one of the eleven Courts of Civil Appeal of Texas. It has been cited and distinguished by the Supreme Court of Texas (the ultimate court of appeal in Texas) in its decision in *Miller* v. *Long Bell Lumber Co.* (1949), 222 S. W. 2d 244.

In the *Long Bell Lumber Co.* case, the lumber company sued for lumber supplied the defendant on 550 invoices totaling $12,906.17. Miller defended upon the ground that 61 of these invoices were over the applicable maximum price ceilings and that therefore (a) either the transactions as a whole were illegal and void, or (b) that the transactions involving the 61 invoices over ceiling prices were illegal and void. The court refused to declare any portion of the contract void, but did deduct from the amount due the total amount of the overcharge on these 61 items in the sum of $790.69.

The first thing that the court did was to distinguish those cases in which the contract indicated an intent to violate or evade the maximum price regulations from the *Long Bell* case which involved an incidental, unintentional and minor violation in an otherwise legitimate business transaction. Included in the cases

distinguished were the *Morgan Ice Company* case and the case of *A. B. Lewis Co.* v. *Jackson,* Texas Civil Appeal, 199 S. W. 2d 853 (also relied upon by petitioner).

And at page 248, the court concludes as follows:

> "We are of the opinion that the Emergency Price Control Act considered as a whole cannot be construed to mean that in cases of an unintentional violation, as here, of some portion of its provisions by a transaction not inherently unlawful that any other penalty or forfeiture can be applied than that which is prescribed in the act. The general rule as to the non-enforceability of illegal contracts is not applicable; the illegality is not of that character which renders void the act done."

The doctrine of the *Long Bell Lumber Co.* case is that *not every illegality renders a contract unenforceable.* If any illegality existed in the contract in question in this case, it was unintentional and is certainly not of a character as will render the contract unenforceable.

Petitioner cites two Federal cases in support of his claim that the contract in question is void and unenforceable (Point A, Petitioner's brief, page 20), to-wit: *Case* v. *Bowles,* 327 U. S. 92, 90 L. Ed. 552, and *Hulbert and Bowles* v. *Twin Falls County,* 327 U. S. 103, 90 L. Ed. 560. Neither of these decisions is applicable, nor does either decision support such contention on the part of petitioner.

The first of said decisions merely held that Congress intended the Emergency Price Control Act to apply

generally to sales of commodities by States. The second of said decisions merely held that said Act applies to the sale of a tractor by a County.

(D) DECISIONS ON ENFORCEABILITY OF CONTRACTS IN VIOLATION OF SIMILARLY WORDED STATUTES.

An excellent statement of the law is to be found in *Macco Construction Co.* v. *Farr*, 137 F. 2d 52, decided by the Ninth Circuit in 1943. In this case the plaintiffs entered into an oral agreement to furnish four automobile trucks and personal services in their operation, and the defendants agreed to hire the same for the entire duration of a certain grading and excavation project of defendants; thereafter the defendants without cause discharged the plaintiffs and refused to allow them to continue performance of the contract. On appeal, appellant Macco Construction Co.'s principal contention was that as a matter of law appellees were not entitled to recover because they had obtained no permit from the Railroad Commission of the State of California. Such a permit was required by virtue of the City Carriers Act No. 5134, Deering's General Laws of the State of California, Statutes of 1935, as amended.

At page 54, the court states:

> "The California City Carriers Act specifically provides penalties for its violation. Certain of these are denominated 'criminal penalties,' Section 13, and others designated 'civil penalties,' Section 14. Where the legislature thus particularly enumerated these penalties we must not assume that some others not named were intended to be included. The act does not declare that a con-

tract entered into or executed between the parties which involved the use of highways in transporting materials was void because no permit had been secured."

Further, at page 54, the court states:

"It is apparent that this contract was not entered into for any illegal purpose or with any understanding or intent to violate the law and hence is not *malum per se,* but appellant insists that the decisions of the California courts hold that where a statute provides a penalty for an act, a contract founded on such an act is void although the statute does not pronounce it void or expressly prohibit it, and cites in support of its position: *City of Los Angeles* v. *Waterson,* 8 Cal. App. 2d 331, 48 Pac. 2d 87; *Holm* v. *Bramwell,* 20 Cal. App. 2d 332, 67 Pac. 2d 114. The contracts in these cases cited, as a reading of the decisions shows, are very different from the one we are here considering. In the Waterson case, the contract was entered into fraudulently for the purpose of evading the law . . . In *Holm* v. *Bramwell, supra,* there is involved the contractor's license law of California, Section 12 of which specifically provides: 'No person engaged in the business or acting in the capacity of a contractor as defined by Section 3 of this Act, shall bring or maintain any action in any court of this state for the collection of compensation for the performance of any act for which a license is required by this act without alleging and proving that such person was a duly licensed contractor at the time the alleged cause of action arose.' . . . There is no such provision in the City Carriers Act No. 5134."

At page 56, the court concludes:

> "It is always the purpose of the law to avoid absurdities, injustice and hardship. We may be sure it never was the legislative intent that beneficiaries of the violation, particularly if they themselves were instrumental in bringing about the breach, should thus be relieved from the just obligation of their contracts."

In *McBroom* v. *Scottish Mortgage & Land Investment Co., supra,* a New Mexico statute relating to usury was involved. The question before this court in that case was whether the contract between the parties was void as to the amount loaned with legal interest, because it provided for, or in its execution involved, the payment of usurious interest. The statute in question imposed a fine upon the person collecting or receiving the higher rate of interest and provided for forfeiting double the amount of the usurious interest collected. (So in our case the Emergency Price Control Act imposed a fine for violation and permitted a remedy of treble damages in addition to other remedies.) The statute did not prevent the recovery of the amount loaned with legal interest.

This court stated in its opinion that where a prohibitory statute points out the consequences of its violation and it appears that the Legislature intended to define such consequences and to exclude others, then no other will be enforced. This court declared that the contract was not void as to principal and legal interest and permitted it to be enforced, declining to add a penalty not prescribed by the statute.

A case very much in point is *Bruce's Juices* v. *American Can Company,* 330 U. S. 743, 67 Sup. Ct. 1015, 91 L. Ed. 1219. The question involved in this case was whether purchase money notes were enforceable because the vendor had violated certain prohibitions of the Robinson-Patman Act, 49 Statutes 1526, 1528, 15 U. S. C. A., Sections 13 and 13(a). At page 750, this court, speaking through Justice Jackson, said:

> "The act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. Violation of the act is made criminal and upon conviction a violator may be fined or imprisoned. Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover three-fold the damages by him sustained and the costs of suit, including a reasonable attorney's fee. This triple damage provision to re-dress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress.
>
> "It is contended that we should act judicially to add a sanction not provided by Congress by declaring the purchase price of goods uncollectible where the vendor has violated the act. It may be admitted as argued that such a sanction would be an effective enforcement provision. Addressed to Congress, this argument might be persuasive, but the very fact that it would obviously be an effective sanction makes it even more significant that the act made no provision for it; . . ."

The decision of this Court in the above case clearly reaffirms the principle that where the statute creates

a new offense and announces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.

In the case of *West 52nd Theatre Co., Inc.*, v. *Tyler*, 178 F. 2d 128, the Court of Appeals for the Second Circuit held that though a mortgage was purchased in violation of the anti-trust laws, that fact alone would not prevent enforcement of the mortgage contract, citing *Bruce's Juices* v. *American Can Co., supra.*

In the case of *Switchmen's Union of North America* v. *National Mediation Board,* 320 U. S. 297, 88 L. Ed. 61, this Court had under consideration the construction of certain provisions of the Railway Labor Act. Speaking of the enforcement of the Railway Labor Act, this Court said:

> "All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. *Tutun* v. *United States,* 270 U. S. 568, 70 L. Ed. 738, 46 S. Ct. 425. In such a case the specification of one remedy normally excludes another. (Citing cases.)"

Point 4.

There Is No Conflict in Other Federal Decisions With the Decision in the Case of *Bruce's Juices* v. *American Can Company, supra.*

There is no uncertainty arising out of the opinion or decision of this Court in the case of *Bruce's Juices.* The decision is certain and clearly to the effect that

the penalties prescribed by a statute which creates a new offense are the only ones the courts can enforce for a violation of that statute.

We have found no Federal decisions which are in conflict with this holding. Petitioner, in POINT F. of his Brief in support of his Petition for Writ of Certiorari (p. 33), by inference seeks to create the impression that the Second and Seventh Circuits of the United States Courts of Appeal have so analyzed and declared the meaning of the decision of this Court in *Bruce's Juices* v. *American Can Company, supra,* as to make that case inapplicable to the situation prevailing in our case. We do not agree with this position on the part of petitioner.

In the first of these cases, *Vines* v. *General Outdoor Advertising Company,* 171 F. 2d 487, (Second Circuit), the opinion referred to the *Bruce's Juices* case as holding that a buyer of goods from the seller, who engaged in violating a statute, may not keep the goods and refuse to pay, upon the theory that the seller's unlawful price did not forfeit his title to the goods, and, since the buyer got title from the seller, he was obligated to perform the conditions of transfer.

In other words, the Second Circuit, in the *Vines* case, construes the decision of this Court in the *Bruce's Juices* case as holding that the contract involved was valid to the extent of giving a seller a remedy for the buyer's breach. This Court did so hold because it rightly refused to read into the Robinson-Patman Act a penalty for its violation which Congress had not prescribed in the Act.

This Court did not hold in the *Bruce's Juices* case that the contract was only valid to the extent of giving the seller a remedy for the buyer's breach. There is nothing in the opinion which even indicates that the contract would be invalid for any other purpose. If the contract in the *Bruce's Juices* case, or for that matter in any other case, was or is valid to the extent of giving the seller a remedy for the buyer's breach (as the Second Circuit declared this Court's decision to mean), then by the same token, is not the contract valid to the extent of giving the buyer a remedy for the seller's breach?

It is respondent's position that if the contract is valid for the one purpose it is also valid for the other.

In the second of said cases, *Turner Glass Corporation* v. *Hartford Empire Company,* 173 F. 2d 49 (Seventh Circuit), the opinion cited the *Bruce's Juices* case as recognizing the distinction between inherent and collateral illegality arising out of any anti-trust law violations.

In our case, the contract sued on by respondent was not inherently illegal. In the first place, as hereinabove pointed out, it has not been proved to have been in violation of the Emergency Price Control Act. In the second place, the contract of purchase, which was clearly within the established ceiling price, was a separate contract from the contract to pay brokerage, as will be hereinafter pointed out, and, therefore, was subject to being enforced without reference to any claimed invalidity under the Emergency Price Control Act. In the third place, as hereinabove pointed out,

the contract, even if in excess of the established ceiling, is not invalid or void because not made so by the Emergency Price Control Act and, therefore, is not inherently illegal. The Anti-trust Act, 15 U. S. C. A., Section 1, provides that every contract in restraint of trade "*is declared to be illegal . . .*" (Emphasis added.) The Sherman Act expressly declares the contract made in violation of its provisions to be illegal. The Emergency Price Control Act does not so provide but merely provides that it shall be unlawful for any person to sell or deliver a commodity in violation of the Act and specifies the penalties for the violation of such Act.

This court in the *Bruce's Juices* case, in referring to the situation intrinsically illegal, recognized that the Sherman Anti-trust Act expressly provided that the contract made in violation of its terms is illegal and recognized that the Robinson-Patman Act did not contain a like provision of illegality. That Act, as does the Emergency Price Control Act, begins: "It shall be unlawful for any person . . . to discriminate in price . . ." (15 U. S. C. A., Section 13(a)). The phrase, "It shall be unlawful," is identical with the beginning of Section 904 (a) of the Emergency Price Control Act.

Point 5.

In Any Case the Contract Is Severable and the Legal Portion May Be Enforced.

In *Hedges* v. *Frink*, 174 Cal. 552 at page 554, 163 Pac. 884, the court states:

> "It is both familiar and declared law (Civil Code, Sec. 1599) that where a contract has several distinct objects, of which one at least is lawful, and one at least unlawful, the contract is void as to the latter and valid as to the rest."
>
> See also *Poultry Producers* v. *Barlow*, 189 Cal. 278, 285, 208 Pac. 93.

Judge O'Connor states in his opinion as follows:

> "but assuming that counsel for Raymond M. Crane is correct in his contention that an *entire* and *inseparable* contract violating OPA ceiling prices would be illegal and unenforceable, *in toto* where one party was receiving the overcharge, it seems to the court that counsel loses sight of the fact that the contract here for the sale of grapes involved (1) Raymond M. Crane, acting in two different capacities, (2) at least two different subject matters, and (3) two different and separate considerations, each for a particular and separate purpose."

There can be a contract for the purchase of grapes without a contract for brokerage; there can be no contract for brokerage without a contract for sale. In the instant case, Crane purported to close a contract with Rains, Denunzio's broker, for three cars of Emperor

grapes at $2.50 per lug. This contract was not in violation of any OPA regulations. The supplemental contract providing for a $50.00 per car procurement charge was payable only if Crane performed under the primary contract and brought the principals (Denunzio and Crane) together in a contract of sale binding upon both principals. This Crane did not do. The law on this point is set forth in 4 Cal. Jur. 584, as follows:

> "The expression most commonly used in the books to describe the duty of the broker to perform the terms of his contract before his right to commission accrues is that he must be the procuring or inducing cause of the sale or purchase. The duty assumed by him is to bring buyer and seller to an agreement, *and until this is done his right to commission does not accrue.*" (Emphasis added.)

The brokerage is an additional sum payable if a contract binding upon the principals is completed.

In order to earn the commission, Crane was required to procure a customer on the terms authorized by Kazanjian. In 4 Cal. Jur. 593, the law on this point is stated as follows:

> "Where the broker is authorized to make a sale or procure a purchaser on certain specified terms, he has no authority to make a sale on other and different terms for the owner, and in the absence of express acceptance thereof by the owner, the broker has not earned, and cannot recover, his commission."

In *Andrews* v. *Waldo,* 205 Cal. 764, 272 Pac. 1052, plaintiff, as a broker, brought an action for recovery

of his commission. The evidence showed that he had been appointed to sell the property at at specified price, payable in a stated sum in cash and the balance to be secured by a mortgage. The written contract of purchase as obtained by the broker provided for the cash payment and the balance secured by a mortgage, but gave the purchaser 30 days after notice from the owner that the escrow was ready to be closed within which to make the cash payment. The court granted a nonsuit holding that the broker had not complied with the terms of the seller in that the cash was not payable immediately but only 30 days after close of escrow, and therefore the commission had not been earned.

From the above, two propositions of law are evident: (1) that a contract for a commission is supplemental to and dependent upon the contract of sale, and (2) that if the contract of sale arranged by the broker is not within the terms of his authority from the seller, the commission is never earned.

It is apparent that the illegality, if any, in the transaction in the instant case was not in the price at which the grapes were offered and accepted, but in the supplemental agreement, that if Crane arranged a binding sale between his undisclosed principal and Denunzio, then Denunzio would also pay $50.00 per car to Crane. It was this added amount, if anything, which brought the total sales price above the maximum ceiling price. Of course, in any case, the brokerage was not earned (4 Cal. Jur. 485) and is not payable by Denunzio, but our point here is that its part in the transaction was that of a supplemental agreement to the primary agree-

ment of sale and the amount involved in the brokerage was the amount that brought the transaction over the ceiling price (assuming that the total amount payable was over the ceiling price).

The brokerage, being the excessive part of the transaction and representing a separate promise for a separate consideration, should be served from the agreement for the sale and purchase of the grapes at an admittedly legal price. (*Fitzgerald* v. *Union Central Life Insurance Co.* (8th Cir., 1930), 42 F. 2d 76.)

Petitioner contends in his POINT C, page 27, of his brief that the payment of the commission when added to the payment of the selling price voided the contract. He cites two cases from this Court and an Alabama case in support of this proposition. We contend that these three cases do not support petitioner in this contention.

In the case of *Fowler* v. *Equitable Trust Co.*, 141 U. S. 385, 35 L. Ed. 786, there was involved an Illinois usury statute, which by its terms prohibited the enforcement of a contract for usurious interest. The express terms of the statute, therefore, made void the contract involving usurious interest. As we have already heretofore pointed out, the Emergency Price Control Act does not by its terms or by implication make unenforceable or void the contract in excess of the established ceiling but provides other penalties for such violation.

The case of *Blumenthal* v. *U. S.*, 332 U. S. 539, 68 S. Ct. 248, 92 L. Ed. 154, was a criminal case involving an indictment for conspiracy under 18 U. S. C. A.,

Section 88. This Court, in deciding that case, affirmed the conviction of the defendants, holding that competent proof was clearly sufficient to show that each defendant had aided in the illegal sale of whiskey and had conspired with others to do so. The principal questions raised on appeal dealt with the sufficiency of proof and the admissions of certain defendants as against others. The gist of the case was whether the defendants conspired to sell whiskey at above ceiling prices. The question was not raised nor did this Court decide that a contract for the sale of a commodity at a ceiling price plus a contract for the payment of a commission to a salesman would make the contract for the sale of the commodity *void* and *unenforceable.* It merely affirmed a conviction for conspiracy where all the defendants knew that the purchaser of the whiskey involved was paying in excess of the ceiling price and had participated in a scheme to collect such a price.

The petitioner contends that the case of *Walker* v. *Bailey,* (Ala.), 33 So. 2d 891, held that the payment by the purchaser of part of the purchase price to the seller and part to his agent made the contract illegal and unenforceable if the total was in excess of the ceiling price. We do not agree that the case so holds. This particular point of law was not discussed in the opinion in that case. The opinion shows that the purchase price was made in two payments, partly by cash and the balance by note. The payment of the ceiling selling price to the seller and a separate payment of a commission to an agent was not involved. The case

held that the seller was not permitted to recover the balance of the selling price where the sale was in excess of the ceiling price.

POINT 6.

Equities of the Case.

In POINT D, page 28 of his brief, petitioner argues that the equities of this case are in favor of himself. Perhaps the best answer to this contention is a quotation from the opinion of Judge O'Connor (79 F. Supp. 117, at 135):

> "Raymond M. Crane, having been the prime mover in soliciting the procurement charge in the first instance, does not stand before the court in very good grace, for it is evident that the reason for the repudiation of the contract by Crane or by Kazanjian, was because the ceiling price on the grapes had been lifted in the meantime and they, or either of them, felt they could obtain a much higher price. This is manifest by the offer of Associated Fruit Distributors to A. B. Rains, Jr., in its telegram of October 10, 1944 (note 9), wherein it offered the grapes at $3.25 a lug, whereas, under the contract under the OPA ceiling, the price per lug quoted had been $2.50."

POINT 7.

Decisions Under the Sherman Act Not Applicable.

In POINT E, pages 29-31 of his brief, petitioner argues that the decisions of this Court under the Sherman Act should be persuasive in this case, and he cites several cases wherein this Court held unenforceable the contract made in violation of the Sherman Act.

As we have heretofore pointed out herein, the Sherman Act (15 U. S. C. A., Section 1) expressly provides and declares that a contract made in violation of the Act is illegal. No such provision appears in the Emergency Price Control Act. Such a provision was suggested in the House Report on the bill, but it was not present in the Senate version and was omitted from the Act as finally passed. The Act makes it illegal to sell at prices in excess of the established ceiling but does not declare such a contract to be illegal, or void or unenforceable, and, in lieu thereof, provides for penalties to be imposed for a violation of the Act.

In view of the difference between the acts, we submit the decisions under the Sherman Act are not applicable to this case.

IX.

Conclusion.

In view of the often announced policy of this Court that the power of certiorari should be sparingly exercised, it is respectfully submitted that this case is not one in which certiorari shoud be granted, and that, therefore, Petitioner's request for such a writ should be denied.

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